STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

T.J. SUTTON,

Defendant-Appellant.

UNPUBLISHED
August 2, 2005

No. 253177
Wayne Circuit Court
LC No. 03-007511-01

Before: Borrello, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

First, defendant argues that the court erred in denying his request for a competency evaluation during trial. We disagree. "[A] criminal defendant's mental condition at the time of trial must be such as to assure that he understands the charges against him and can knowingly assist in his defense." *People v McSwain*, 259 Mich App 654, 692; 676 NW2d 236 (2003). "The conviction of an individual when legally incompetent violates due process of law." *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000). "[A] defendant is presumed competent to stand trial unless his mental condition prevents him from understanding the nature and object of the proceedings against him or the court determines he is unable to assist in his defense." *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). Whether a defendant is competent to stand trial is an ongoing concern of the court, and the issue of competency may be raised by either party or by the court at any time during or after the trial. *Carey*, *supra* at 232; *People v Garfield*, 166 Mich App 66, 74; 420 NW2d 124 (1988). The trial court has a duty to order a competency evaluation if "facts are brought to its attention which raise a 'bona fide doubt' as to the defendant's competence." *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). The trial court is not required to accept without question an attorney's representations concerning the competence of his client, although counsel's expression of doubt in that regard is a factor which should be considered. *Drope v Missouri*, 420 US 162, 177 n 13; 95 S Ct 896; 43 L Ed 2d 103 (1975). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of th[o]se factors standing alone may, in some

circumstances, be sufficient." *Id*. at 180. The trial court's ruling "as to the existence of a 'bona fide doubt'" is reviewed for an abuse of discretion. *Harris, supra* at 102.

In this case, there is no existing medical opinion regarding defendant's competence. The record showed that defendant had been diagnosed with depression, but there was no evidence that he was suffering from the effects of that disorder at the time of trial. He had been hospitalized briefly the day before trial and treated with diphenhydramine, a medication that appears to be unrelated to the treatment of mental illness. 2 Schmidt, *Attorneys' Dictionary of Medicine* (New York: Matthew Bender & Co, 2000), p D-146. The fact that defendant was treated with this medication is consistent with counsel's representation that defendant was hospitalized due to a reaction to some other medication.

There is nothing in the record to suggest that defendant's demeanor at trial was anything other than normal except for the brief outburst which led to his temporary removal from the courtroom. That outburst appeared to have been prompted by an angry reaction to the court's refusal to adjourn trial, as opposed to delusional thinking. Counsel never claimed that defendant could not communicate effectively with her, and the record showed that after defendant calmed down, he was able to assist counsel in presenting his defense and did in fact testify. Based on the record presented, we find that the trial court did not abuse its discretion in finding that there was not a bona fide doubt regarding defendant's competence.

Next, defendant claims error with respect to the trial court's instruction regarding reasonable doubt. We review de novo claims of instructional error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). To preserve a claim of instructional error for appeal, the party must object on the record to the trial court's failure to give an instruction before the jury retires to consider the verdict, stating specifically the matter to which the party objects and the grounds for the objection. *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999). Here, defendant failed to object to the trial court's reasonable doubt instruction on the record; therefore, the issue is unpreserved and our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763-764.[1]

[1] We note our Supreme Court's decision in *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000), which provides that unpreserved constitutional error classified as structural error requires automatic reversal. We conclude that this case does not present any structural error. While the United States Supreme Court has classified a seriously defective reasonable doubt instruction as a structural error subject to automatic reversal, *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993), this case is distinguishable in that it involves a largely correct definition of reasonable doubt that included one arguably incorrect statement. Thus, any error here was more akin to an error involving the instruction on one element of a crime (not structural) rather than an erroneous failure to instruct on the elements of a crime altogether (structural). *Duncan, supra* at 54. Defendant was not denied a "basic protection" and his conviction was not rendered "unfair or unreliable" because of the minor reasonable doubt instructional error at issue. *Duncan, supra* at 52, quoting *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

"To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Here, the trial court gave the following instructions to the jury concerning reasonable doubt:

> The standard of proof, again, is reasonable doubt, proof beyond a reasonable doubt. It is not proof beyond all doubt. It is not proof beyond a shadow of a doubt. It is proof beyond a reasonable doubt.
>
> Now, a reasonable doubt is the *kind of doubt that you can assign a reason for having* the doubt. It's based on reason and common sense. A fair, honest, and reasonable doubt.
>
> If you can say that you have an abiding conviction to a moral certainty, then you have no reasonable doubt. If you do not have an abiding conviction to a moral certainty, you do have a reasonable doubt.
>
> In other words, a reasonable doubt is a fair, honest, and reasonable doubt. It is not a vain, imaginary, flimsy, a hunch, it is not a feeling, it is not a possibility of innocence. It's a fair, honest, and reasonable doubt. *The kind of doubt that you can assign a reason for having*. The kind of doubt that would make you hesitate before making an important decision.

This instruction was largely based on standard jury instruction CJI2d 3.2. Defendant complains that, in addition, the trial court added the italicized sentences suggesting that a juror have "*a reason*" before concluding that he or she has a reasonable doubt concerning defendant's guilt.

A panel of this Court has suggested, in dicta, that, when a trial court instructs a jury to base its decision on "a reason," it calls upon the jury to justify its decision, and such an instruction improperly shifts the burden of proof to the defendant by requiring the jurors to have a reason to doubt the defendant's guilt. See *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988) ("[a]n instruction defining reasonable doubt may not shift the burden of proof by requiring the jurors to have a reason to doubt the defendant's guilt"); *People v Foster*, 175 Mich App 311, 316, 319; 437 NW2d 395 (1989), overruled on other grounds in *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995) (prosecutor committed error requiring reversal when he argued, inter alia, that jurors must have "a reason" for their doubt). But see *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995), where this Court held that it was not error requiring reversal for a prosecutor to argue that a juror must have a reason for any doubt, but noted that the trial court properly instructed the jury regarding what constituted a reasonable doubt.

We note initially that, in apparent contrast to *Jackson* and *Foster*, the trial court's instruction included an appropriate definition of reasonable doubt. The United States Supreme Court has held that "so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994) (citations omitted). Rather,

taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury. *Id*. The Court held that the relevant inquiry is not whether the instruction could have been applied in an unconstitutional manner, but rather, whether there is a reasonable likelihood that the jury did apply the instruction in an unconstitutional manner. *Id*. at 6. Stated differently, the relevant inquiry is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the standard that the government must prove every element of a charged offense beyond a reasonable doubt. *Id*.

Here, because the instructions taken as a whole correctly conveyed the concept of reasonable doubt to the jury, there was "no reasonable likelihood that the jurors . . . applied the instructions in a way that violated the Constitution" by lowering the government's burden of proof. *Id*. at 22-23. Therefore, we find that defendant has not met his burden of demonstrating plain error that affected his substantial rights. *Carines, supra* at 763. Further, even if defendant had demonstrated prejudice, reversal is only warranted if the plain error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Id*. There is no showing that defendant is actually innocent, and we are not persuaded that the fairness, integrity, or public reputation of the proceedings was seriously affected where a correct definition of reasonable doubt was included in the trial court's instructions.

We affirm.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly